

2011 APR -7 PM 4: 15

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11  
12 SUPERIOR COURT OF STATE OF ARIZONA  
13 COUNTY OF YAVAPAI

14 STATE OF ARIZONA,

15 Plaintiff,

16 vs.

17 JAMES ARTHUR RAY,

18 Defendant.

CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

**DEFENDANT JAMES ARTHUR RAY'S  
MOTION FOR RECONSIDERATION  
OF ORAL RULING TO ADMIT  
EVIDENCE OF PRIOR SWEAT LODGE  
CEREMONIES**

20  
21 Defendant James Arthur Ray, by and through undersigned counsel, hereby moves this  
22 Court to reconsider its April 6 ruling to admit evidence from prior sweat lodge ceremonies. This  
23 motion is supported by the following Memorandum of Points and Authorities.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 By operation of a terse oral ruling *eight weeks into trial*, this Court has reversed its prior  
4 orders and eviscerated the law of the case. The sudden reversal holds that the very same evidence  
5 that was ruled inadmissible before trial—a ruling that has been reaffirmed several times during  
6 trial—will now be admitted. This about-face decision violates constitutional Due Process, the fair  
7 trial guarantee of the Sixth Amendment, Arizona Rule of Criminal Procedure 15.6(c), and  
8 Arizona Rule of Evidence 404.

9 The Due Process violation effected by the Court’s reversal, and the attendant prejudice to  
10 Mr. Ray, are unmistakable. The State, not Mr. Ray, noticed the prior sweat lodge evidence under  
11 Rule 404(b). Mr. Ray timely challenged that notice, and prepared his defense in reliance on the  
12 Court’s February 3 ruling *excluding* the prior sweat lodge evidence for 404(b) purposes. Despite  
13 the State’s repeated attempts to upend this ruling, the Court reaffirmed the ruling several times  
14 during trial, rejecting the very same “pattern” argument the State now repeats. In particular:

- 15 • The Court stated that to “suggest that there was anything like what happened in  
16 2009” at prior years’ sweat lodge ceremonies “would be very, very misleading.”  
17 Trial Transcript, 3/25/11, at 68:3–20.
- 18 • The Court stated that “[I]n fact, there was no similar situation to what happened  
19 in October of 2009.” Trial Transcript, 3/25/11, at 54:21–55:1.
- 20 • The State attempted to introduce information regarding prior sweat lodge  
21 ceremonies through the expert testimony of Dr. Robert Lyon. The Court denied  
22 the attempt. The Court asked the question to which the State has no answer—  
23 “*How would a prior incident from four years ago -- how would it relate to what*  
24 *an opinion would be as to what caused the situation here?*” Trial Transcript,  
25 3/31/11, 10:9–13. The Court also agreed with the Defense that the State was  
26 “treading on dangerous grounds.” *See id.* at 16:1–4 (“THE COURT: We are.  
27 There is no doubt about that. That could take us right into the 404(b) area.”). To  
28 have relevance to disproving the presence of a superseding cause, the sweat lodge

1 and materials would have to be “*completely the same*”; the Court wanted to wait  
2 to hear from a witness who would state that the materials were “*just absolutely*  
3 *identical.*” Draft Trial Transcript, 4/1/11, at 98:1–21.

4 To say now that Mr. Ray has been on fair notice that the Court would admit the deluge of  
5 prior sweat lodge evidence that is at issue, eight weeks into trial, would rewrite the record. At  
6 every turn, the Court denied the State’s attempts to introduce the evidence and confirmed its  
7 earlier rulings. Moreover, as explained below, the motion deadlines in the Rules of Criminal  
8 Procedure and the notice and fairness prongs of the Due Process forbid the Court from permitting  
9 the State to proceed with an *eighth* theory for the very same evidence mid-way through trial.

10 The prejudice to Mr. Ray from the Court’s reversal is real and irreparable. Eight weeks  
11 into trial, the Court has fundamentally altered the nature and terms of this case. Rather than a  
12 prosecution focused on the 2009 events, Mr. Ray will now be subjected to weeks (or months) of  
13 testimony regarding each prior sweat lodge, including 15 witnesses who attended *only* prior  
14 ceremonies. Had the Court ruled the prior sweat lodge evidence admissible prior to trial,  
15 everything about Mr. Ray’s defense, from selection of witnesses to opening statement to cross-  
16 examination of experts, would have followed a different course. These actions cannot now be  
17 undone. Nor can Mr. Ray rid the jury of the damaging perception that the Defense has somehow  
18 hidden the ball for the past eight weeks, even though in fact the Defense was faithfully heeding  
19 this Court’s orders.

20 Moreover, the Court’s ruling is substantively incorrect. The State’s theory—an alleged  
21 “pattern” of injuries inflicted by Mr. Ray, in which Mr. Ray himself is “the only common  
22 denominator”—is quintessential propensity evidence, barred by Rule 404(a). If there is *any*  
23 permissible purpose for this alleged “causation” evidence under the Rules of Evidence, it would  
24 be to show an absence of mistake or accident under Rule 404(b). Yet the Court properly rejected  
25 that possibility in its February 3 Order. “[D]espite the large number of participants,” the Court  
26 explained, “there is no substantial medical evidence that any of the persons attending the pre-  
27 2009 Spiritual Warrior events suffered a life-threatening condition. Therefore, with regard to  
28 manslaughter charges, evidence of the similarity of the way in which the sweat lodge and other

ceremonies were conducted from year-to-year is *not* relevant and admissible on the issues of knowledge (i.e., conscious disregard of a known risk) *and absence of mistake or accident.*”

Under Advisement Ruling on MIL No.1, 2/3/11, at p.3.

Recognizing the serious prejudice associated with the prior sweat lodge evidence, this Court noted several times in its oral ruling that a limiting instruction may be warranted. But to phrase the instruction is to identify the Court’s error. How can the jury be told to avoid drawing any propensity inferences, yet also be told that it *may* infer, as the State has argued, that Mr. Ray caused the deaths in 2009 because he is the only “common denominator” in all the sweat lodges allegedly gone wrong? The State’s theory, by its own description, is that because Mr. Ray (allegedly) caused people to get sick in the past, he likely caused the three deaths in 2009. This, according to the State, “proves” that participants in 2009 died because of Mr. Ray and not any other cause. This is the classic “where there is smoke, there is fire” argument prohibited by Rule 404(a). There is no non-propensity mechanism for this reasoning, and no way of squaring it with the Rules of Evidence.

The grave constitutional error at issue here constitutes good cause for reconsideration. See Ariz. R. Crim. P. 15.6(d). This Court should correct its error before this trial falls beyond repair.

## **II. ARGUMENT**

### **A. Permitting the introduction of prior sweat-lodge evidence eight weeks into trial violates Due Process and renders this trial fundamentally unfair.**

#### **1. The court’s April 6 oral ruling is an about-face that reverses the law of the case.**

Notwithstanding the Court’s assurances to the contrary, the Court’s April 6 oral decision directly reverses the rulings that have governed this case from the beginning. The written, binding Order of February 3, and each of the Court’s oral affirmations of that Order, have specifically rejected the theory the State now advances. This theory, which the State now labels “causation,” argues that the prior years establish a “pattern,” or *propensity*, through which Mr. Ray inflicts harm upon sweat lodge participants. This pattern, the State posits, shows that the

1 deaths in 2009 were caused not by an accident, but rather by Mr. Ray. But the February 3 ruling  
2 proscribes this reasoning in clear terms:

3 “[D]espite the large number of participants, there is no substantial  
4 medical evidence that any of the persons attending the pre-2009  
5 Spiritual Warrior events suffered a life-threatening condition.  
6 Therefore, with regard to manslaughter charges, evidence of the  
7 similarity of the way in which the sweat lodge and other ceremonies  
8 were conducted from year-to-year is not relevant and admissible on  
9 the issues of knowledge (I.e., conscious disregard of a known risk)  
10 **and absence of mistake or accident.**” Under Advisement Ruling  
11 on MIL No.1, 2/3/11, at p.3.

12 The Court’s February 3 ruling additionally held that the evidence from prior years was not  
13 sufficiently similar, for 404(b) purposes, to the deaths involved in the charged crime. *See id.*  
14 (“the evidence presented in this 404(b) proceeding does **not** establish that the harm manifested by  
15 signs and symptoms associated with some pre-2009 sweat lodge participants was **similar** for  
16 purposes of Rule 404(b) analysis to the life-threatening and fatal conditions suffered by some  
17 participants in 2009”); *id.* at 2 (“Without medical testimony or other substantial medical evidence  
18 to the contrary, evidence of the alleged disturbing physical and mental manifestations exhibited  
19 by pre-2009 sweat lodge participants is **not sufficiently similar** to the medical conditions  
20 associated with deaths in 2009 to show relevance to the issue of knowledge (conscious disregard  
21 of a substantial and unjustifiable risk) in a manslaughter case.”).

22 As detailed below, there is no principled basis upon which to distinguish the Court’s  
23 February 3 ruling and subsequent affirmations from its April 6, mid-trial reversal. The evidence  
24 at issue is exactly the same. And the State’s argument, too, remains the same in substance.  
25 Although now phrased in terms of causation, the State’s argument relies upon the *very same*  
26 propensity logic this Court heard in November 2010, considered for three months, and rejected in  
27 February 2011. Indeed, as recently as last week, the State emphasized that its theory has never  
28 changed. *See State’s Reply Re: Bench Memorandum Regarding Lesser Included Offenses*, filed  
4/1/11, at 2 (“The State has never changed the theory of its case. The State has always believed  
the prior sweat lodge events were relevant to show Defendant was aware and consciously

1 disregarded a substantial and unjustifiable risk that his conduct would cause the death of  
2 another.”).

3           **2. The Court’s repeated affirmations of the February 3 order entrench**  
4           **the law of the case, justify Mr. Ray’s reliance, and bar any argument**  
5           **that Mr. Ray had constitutionally sufficient notice of the April 6**  
6           **reversal.**

7           The law of the case on which Mr. Ray reasonably relied was set forth in much more than  
8 just the February 3 written Order. The Court has also, *multiple times*, reaffirmed its 404(b)  
9 ruling, and rejected the State’s attempts to introduce the prior sweat lodge evidence.

- 10           • On March 2, the Court explicitly denied the State’s motion for reconsideration and  
11           reaffirmed its 404(b) ruling. The Court did state that it could see potential  
12           relevance to causation, but the Court clarified that ruling on March 9.
- 13           • On March 9, the Court ruled that “it’s not appropriate to allow evidence under  
14           404(b) that would apply only to the lesser included negligent homicide charge but  
15           not to the manslaughter charge. The risk of prejudice would just be too great to  
16           have that in place.” Trial Transcript, 3/9/11, at 6–11. The Court indicated that the  
17           prior “medical effects” related to the sweat lodge ceremonies could be relevant to  
18           causation *only* upon a showing that “expert testimony indicating that evidence of  
19           medical effects of prior events is relevant evidence.” Trial Transcript, 3/9/11, at  
20           6:6–11; *see id.* at 8:25–9:3 (“there would have to be **expert testimony that would**  
21           **indicate that evidence of effects of prior sweat lodge events is relevant to the**  
22           **issue of causation.**”).<sup>1</sup> Without such a link, “the risk there would be that a lot of  
23           this evidence would come in and it would never be tied to causation.” *Id.* at 7:7–9.

24  
25  
26           <sup>1</sup> General expert testimony that heat illnesses lie on a spectrum cannot possibly forge this link. The  
27           relevant question is whether an expert believes that an alleged past symptom that is consistent with, but  
28           not specific to, some heat illness, is relevant to the determination of cause of death in 2009. Such an  
            opinion could have no legitimate basis. It is medically impossible to infer, from a person vomiting in  
            2007, anything about a different person’s death in 2009.

- 1                   • On March 25, Ms. Polk advised the Court that she wished to ask witness Scott  
2                   Barratt whether he was informed of alleged injuries at prior sweat lodge  
3                   ceremonies. Disregarding this Court's ruling that the prior sweat lodge evidence is  
4                   not relevant to show mental state, the State argued, "Mr. Ray's level of knowledge  
5                   is that things can go horribly wrong. And he does not fairly warn these participants  
6                   how bad things can be and that he's had problems in the past." Trial Transcript,  
7                   3/25/11, at 57:19–23.
- 8                   • In response, the Court noted that there would be no factual basis for the  
9                   comparison upon which the State's argument rested: "And then it's back to the  
10                  whole situation of somehow portraying through your questions that there were  
11                  similar situations when, *in fact, there was no similar situation to what happened*  
12                  *in October of 2009*. At least that was the determination at the 404(b)." Trial  
13                  Transcript, 3/25/11, at 54:21–55:1.
- 14                • Further, the Court said that this line of questioning would be "very, very  
15                misleading": "And, Ms. Polk, here's the problem: The asking questions suggest --  
16                are going to suggest that there was anything like what happened in 2009, from the  
17                evidence I've seen, would be very, very misleading. One person went to the  
18                hospital over a period of a number of years with a non life-threatening condition.  
19                The other problem is the 404(b) testimony was on a whole different standard of  
20                proof. I found clear and convincing that certain instances happened. They were  
21                relatively isolated. There wasn't a lot of specificity. Any incidents that become the  
22                subject of testimony would have to also include knowledge by Mr. Ray. So to go  
23                into that with this witness and suggest there might be just multiple people out there  
24                that Mr. Ray knew about everybody, that would be -- I don't see the basis for that."  
25                *Id.*, 3/25/11, at 68:3–20.
- 26                • Later, on March 31, the State attempted to introduce information regarding prior  
27                sweat lodge ceremonies through the expert testimony of Dr. Robert Lyon. The  
28                Court denied the attempt. The Court asked the question to which the State has no

1 answer—"How would a prior incident from four years ago -- how would it relate  
2 to what an opinion would be as to what caused the situation here?" Trial  
3 Transcript, 3/31/11, 10:9–13. The Court also agreed with the Defense that the  
4 State was "treading on dangerous grounds." *See id.* at 16:1–4 ("THE COURT: We  
5 are. There is no doubt about that. That could take us right into the 404(b) area.").

- 6 • The following day, on April 1, the State again tried to introduce evidence relating  
7 to prior sweat lodge ceremonies through the testimony of Fawn Foster, arguing  
8 that the fact that the sweat lodge structure was the same between years made the  
9 prior ceremonies relevant to causation. At that point, the Court expressed concern:

10 "[W]hat I had said is that if in fact this was the same sweat lodge structure that  
11 was used in October, ***completely the same***, then there would be relevance to  
12 this person being in that sweat lodge. I'm concerned about whether she really  
13 [knows] that and concern about is there really another witness who would be  
14 saying that the materials are ***just absolutely identical. There hadn't been any***  
15 ***changing in the covering or anything like that.*** I didn't want to go any further  
16 without addressing that."

17 MS. POLK: Your Honor, it's the states belief there will be two more witnesses  
18 that or perhaps three the Hamiltons will testify that it is the same skeleton and  
19 the same materials. And then I believe Mr. Mercer will as well.

20 THE COURT: ***For the testimony to be admissible on the basis I've indicated***  
21 ***at sidebar, that's critical.*** That that's the case. So I wanted to stop and make  
22 sure that that is the case before you got into those questions about her  
23 experience in may or whenever it was. I wanted to address that." Trial

24 Transcript, 4/1/11, at 96:1–24.<sup>2</sup>

25  
26 <sup>2</sup> In addition, the State made an *avowal* to the Court on that day that the testimony would show the  
27 materials were the same. The actual testimony has proven that avowal false. Ted Mercer testified that he  
28 had no personal knowledge of whether the coverings were the same, and knew affirmatively that the wood  
and rocks were *not* the same and that new tarps were found in the pumphouse prior to the erection of the  
October 8, 2009 sweat lodge. Furthermore, Michael and Amayra Hamilton, interviewed by the Defense in  
the State's presence on April 6, 2011, stated that they were not involved or present during the erection of

1        These rulings, each rejecting the State's attempt to introduce the same set of alleged prior  
2 sweat lodge evidence, reinforce the Court's February 3 ruling. They constitute the law of the  
3 case, a basis for fair reliance, and the ground rules under which Mr. Ray prepared and has  
4 presented his defense.

5                    **3.        The Court's April 6 ruling will irreparably prejudice Mr. Ray.**

6        The Court's reversal of its prior rulings will cause real and serious prejudice to Mr. Ray's  
7 defense. As earlier noted, Mr. Ray timely litigated the State's 404(b) notice in an effort to  
8 facilitate the orderly presentation of evidence at trial.<sup>3</sup> Upon receiving the Court's favorable  
9 ruling, Mr. Ray prepared a defense, and a trial strategy, focused exclusively on the 2009 events.  
10 Had the Court ruled that the prior sweat lodge evidence *was* admissible, every aspect of Mr.  
11 Ray's defense would have changed. The Defense would have woven the prior ceremonies into its  
12 opening statement and into each cross-examination. With regard to experts, the Defense would  
13 have asked questions designed to drill down into the extent of prior symptoms and their (lack of)  
14 connection to the 2009 deaths. The Defense also would have investigated and sought out  
15 additional witnesses to call in its case-in-chief. Now, eight weeks into trial, it is too late to  
16 change course without serious harm, in the eyes of the jury, to the credibility of the Defense and  
17 the defendant. Moreover, given the Court's denial of a stay, the Defense does not have time to  
18

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19 any sweat lodge, including 2009, and therefore lack personal knowledge about the similarity (or lack  
20 thereof) of the materials used in any of the sweat lodges.

21 <sup>3</sup> It was the State's burden, not the criminal defendant's, to identify before trial its intended use of prior  
22 sweat lodge evidence. *See* Ariz. R. Crim. P. 15.1(b)(7). The Defense repeatedly asked the State to  
23 provide notice of its intended use of prior sweat lodge evidence so that the Defense could determine its  
24 motion practice. The State did not mention causation. Yet the State knew causation was a defense,  
25 because Mr. Ray noticed it in his Initial Statement under Rule 15.2 in March 2010, and in May 2010  
26 supplemented the disclosure with a medical expert designation. The State was again notified that  
27 causation was the crux of Mr. Ray's defense from the motion to compel information related to medical  
28 examiners filed in August 2010. Not only did the State have ample opportunity to select its theory, but the  
State in fact litigated numerous theories: knowledge, intent, motive, plan, absence of mistake or accident,  
"participants' state of mind," and an alleged "goal." *See* State's Response to MIL No. 1, filed 8/10/10  
(intent, knowledge, absence of mistake, motive, plan); State's Motion for Reconsideration re: MIL No. 1,  
filed 2/14/11 (arguing relevance to criminal negligence, participants state of mind, and defendant's  
"goal"). The Court rejected these, and the motion deadline in this case has long passed. *See* Ariz. R.  
Crim. P. 15.6(c). To permit the State, mid-trial, to proceed under an *eighth* theory based on the very same  
propensity reasoning, now labeled "physical causation"—after virtually identical reasoning has been  
rejected—cannot be consistent with Due Process.

1 meaningfully adapt its presentation and conduct the further preparation that will be necessary to  
2 meet the onslaught of prior-year witnesses the State apparently plans to call.

3 **B. The Court's ruling is substantively incorrect, because Rule 404 does not**  
4 **permit introduction of the "pattern" the State alleges.**

5 The Court's April 6 ruling is premised on the incorrect notion that the State's "pattern"  
6 theory, labeled as a breed of "causation," is not subsumed within the Court's 404(b) ruling. It is.  
7 The alleged pattern of a defendant's prior actions in a criminal case is squarely a 404 issue, and  
8 absent an applicable exception, is barred by Rule 404(a). To the extent any exception could  
9 possible be invoked here, the State's argument that the prior incidents prove an absence of  
10 accident in 2009 is governed by—but fails to satisfy—the "absence of mistake or accident"  
11 exception to Rule 404(b).

12 **1. Rule 404(a) bars the State's attempt to introduce propensity evidence.**

13 By the prosecution's own description, the State's theory is that evidence of Mr. Ray's  
14 involvement in prior sweat lodges demonstrates a "pattern" in which the "common denominator"  
15 is Mr. Ray. From that "pattern," the State argues, the jury can infer that Mr. Ray, and not a  
16 superseding cause, caused the three deaths:

17 "[T]here is actually three patterns that are relevant. The first is that  
18 if it's the defendant running the sweat lodge, then people get sick. It  
19 doesn't matter what the kiva is made of. It doesn't matter what the  
20 covering is made of. What matters if it's the defendant running the  
21 sweat lodge then people get sick. During that time frame from 2005  
22 through 2009, there are many other sweat lodges that are conducted  
23 on the property of Angel Valley and testimony will be that people  
24 don't get sick. So **the first pattern is regardless of the kiva,  
regardless of the tops and the coverings and the wood and the  
water, and the rocks if the defendant runs it then people get  
sick. That's what's identical. . . . So the first pattern is it doesn't  
matter what the [inaudible] is made of what the covering is made of  
the common [denominator is the] defendant.**" Draft Trial  
Transcript, 4/6/11, at 13:9–14:9.

25 This is propensity reasoning, not a theory of "physical causation." Were the State  
26 concerned with physical causation, the common denominator would be heat, not Mr. Ray, and the  
27 nature and number of the coverings, the wood, the water, and the rocks would all matter—  
28 because they affect the intensity of the heat, or lack thereof. Instead, the State argues that *Mr.*

1 Ray is the causal agent. This is explicitly a theory of Mr. Ray's propensity for recklessness rather  
2 than an argument regarding heat as opposed to toxins. Rule 404(a) thus bars the State's theory.

3 **2. The Court's 404(b) ruling rejected the State's current theory.**

4 In any event, the State's current theory is precluded by the Court's Rule 404(b) ruling,  
5 which the Court has held that it has not and will not reconsider its 404(b) ruling. Through that  
6 ruling, the Court has *already rejected* the "pattern" theory the State now advances.

7 Rule 404(b)'s "absence of mistake or accident" exception governs—and bars—the State's  
8 theory. The exception, associated with the "doctrine of chances," applies when a pattern in prior  
9 events creates an inference that the same pattern was followed in the instant event. As one  
10 leading evidence treatise explains, "[o]ften the absence of mistake or accident is proved on a  
11 notion of probability; i. e., how likely is it that the defendant would have made the same mistake  
12 or have been involved in the same fortuitous act on more than one occasion." Wright & Miller,  
13 22 Fed. Prac. & Proc. Evid. § 5247 (1st ed.). See also *Westfield Ins. Co. v. Harris*, 134 F.3d 608,  
14 615 (4th Cir. 1998) (holding that prior fires were admissible under Rule 404(b) to disprove that  
15 the fire in the charged case came about by accident), quoted in *State v. Valdez*, 2007 WL  
16 5578391, \*4 (Ariz. App. 2007). The "doctrine of chances," the Fourth Circuit Court of Appeals  
17 has explained, "posits that the more often an accidental or infrequent incident occurs, the more  
18 likely it is that its subsequent reoccurrence is not accidental or fortuitous." Thus, "where prior  
19 acts of apparent coincidence are similar, the repeated reoccurrence of such an act takes on  
20 increasing relevance to support the proposition that there is an absence of accident." *Id.* (citing  
21 Wigmore § 302, at 246). "The doctrine of chances and the experience of conduct tell us that  
22 accident and inadvertence are rare and casual; so that the reoccurrence of a similar act tends to  
23 persuade us that it is not to be explained as inadvertent or accidental." *Id.* (quoting Wigmore §  
24 242, at 45).

25 For example, in *State v. Silva*, 153 Me. 89, 98 (Me. 1957), *overruled on other grounds*,  
26 *State v. Brewer*, 505 A.2d 774 (Me. 1985), the question was whether an infant had died from  
27 accident or from a person's unlawful force, and if the latter, whether the person was the  
28 defendant. The Court held that the infant's old injuries "ha[d] probative value in determining

1 whether or not *accidental causation* ha[d] been eliminated beyond a reasonable doubt.” *Id*  
2 (emphasis added). The applicable “rule of logic and reason,” the court explained, is that “[a]s . . .  
3 abnormal results are multiplied, instance upon instance, the likelihood of accidental causation  
4 diminishes to the vanishing point.” *Id.* (citing Wigmore on Evidence, 3d Ed., at 196). *See also*  
5 *People v. Erving*, 63 Cal.App.4th 652, 659-60 (App. 1998) (admitting evidence of prior fires in an  
6 arson prosecution because “[t]he doctrine of chances tells us it is extremely unlikely that, through  
7 bad luck or coincidence, an innocent person would live near so many arson fires, occurring so  
8 frequently, in so many different neighborhoods”).

9 That is precisely the reasoning the State advances here in the name of “causation.”  
10 Because people at prior JRI sweat lodges allegedly “got sick,” the State alleges, it is unlikely that  
11 an accident or superseding force caused the deaths in 2009. Instead, because the “common  
12 denominator” among the sweat lodge ceremonies was Mr. Ray, it is likely that his conduct was  
13 the cause of the deaths.

14 The Defense has briefed elsewhere the implausible logic of this grossly oversimplified  
15 description of events, and the clear problems under Rule 403 of permitting the jury to receive this  
16 inference. For present purposes, the critical point is that the Court’s February 3 ruling, and its  
17 subsequent oral affirmations, *necessarily include* the doctrine-of-chances reasoning the State now  
18 advances. There is no other rule under which such a proposed pattern could be admitted, and  
19 there is no other way to interpret the Court’s rulings that the alleged prior symptoms were *not*  
20 sufficiently similar to establish an absence of mistake or accident. *See* Under Advisement Ruling  
21 on MIL No. 1 , 2/3/11, at p.3 (“[E]vidence of the similarity of the way in which the sweat lodge  
22 and other ceremonies were conducted from year-to-year is *not* relevant and admissible on the  
23 issues of knowledge (i.e., conscious disregard of a known risk) *and absence of mistake or*  
24 *accident.*”).

25 3. **The State’s theory would fail even if it had not previously been**  
26 **rejected by this Court.**

27 The Court’s rationale for sidestepping Rule 404(b) issue at this late stage is that the  
28 alleged injuries and incidents from prior sweat lodge ceremonies are, or have become, “intrinsic”

1 evidence. That is false. The doctrine of intrinsic evidence pertains to evidence that is  
2 “inextricably intertwined” with the charged crime. *See, e.g., United States v. Bowie*, 232 F.3d  
3 923 (2000). “[I]f the evidence is of an act that is part of the charged offense, it is properly  
4 considered intrinsic.” *Id.* at 929. *See also State v. Dickens*, 187 Ariz. 1, 18 n. 7 (1996) (evidence  
5 of a prior act is intrinsic “when evidence of the other act and evidence of the crime charged are  
6 ‘inextricably intertwined’ or both acts are part of a ‘single criminal episode’ or the other acts were  
7 ‘necessary preliminaries’ to the crime charged”). Evidence does not meet this standard simply  
8 because it “completes the story” in some general sense. After all, “all relevant prosecution  
9 evidence explains the crime or completes the story,” but “[t]he fact that omitting some evidence  
10 would render a story slightly less complete cannot justify circumventing Rule 404(b) altogether.”  
11 *Bowie*, 232 F.3d at 929. The Court held as much in its prior 404(b) ruling. The State’s latest  
12 theory--resting on the very same body of evidence--does not justify a departure from that ruling.

### 13 **III. CONCLUSION**

14 The gravity and prejudice of the Court’s sudden, oral ruling admitting prior sweat lodge  
15 evidence cannot be overstated. Eight weeks into trial, the Court has uprooted the central ground  
16 rules on which the Defense has relied in forming its case. The ruling is an untimely reversal of  
17 the law of the case without proper notice or good cause, in violation of the Fourteenth  
18 Amendment’s Due Process Clause and the Sixth Amendment’s fair trial promise. And the ruling  
19 severely prejudices Mr. Ray’s Defense. It is too late for Mr. Ray to unring the bell of the  
20 Defense’s opening statement, cross-examinations, and positions before the jury. But it is not too  
21 late for this Court to reconsider and return to its longstanding ruling in this case. The Court  
22 should do so now.

1 DATED: April 7, 2011

MUNGER, TOLLES & OLSON LLP  
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6 By: 

Attorneys for Defendant James Arthur Ray

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9 Copy of the foregoing delivered this 7th day  
of April, 2011, to:

10 Sheila Polk  
11 Yavapai County Attorney  
12 Prescott, Arizona 86301

13 by 

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,           )  
                                  )  
Plaintiff,                    )  
                                  )  
vs.                            ) Case No. V1300CR201080049  
                                  )  
JAMES ARTHUR RAY,           )  
                                  )  
Defendant.                    )  
\_\_\_\_\_

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE WARREN R. DARROW  
TRIAL DAY TWELVE  
MARCH 9, 2011  
Camp Verde, Arizona

REPORTED BY  
MINA G. HUNT  
AZ CR NO. 50619  
CA CSR NO. 8335

1 effects, had there been inquiry, what would have  
2 been learned? Just as an example.

3 But the charge was not just negligent  
4 homicide. And as a result of that, the 403 factor  
5 comes in because of the charge of manslaughter.  
6 And I determined that it's not appropriate to allow  
7 evidence under 404(b) that would apply only to the  
8 lesser included negligent homicide charge but not  
9 to the manslaughter charge.

10 The risk of prejudice would just be too  
11 great to have that in place. And I didn't see any  
12 further briefing on that.

13 The ruling that I issued did not cover  
14 admissibility for non-404(b) purposes. If the  
15 evidence -- if the information is disclosed  
16 properly, then it can be offered in good faith for  
17 a non-404(b) purpose. And my ruling would not have  
18 changed that in any way. That would just be the  
19 typical posture of any case where there are  
20 objections or motions in limine that come up during  
21 trial.

22 One potential non-404(b) purpose is  
23 related to causation. I made that determination.  
24 I can see that there may be relevance to that  
25 question.

1                   However, I conclude that until there is  
2                   expert testimony indicating that evidence of  
3                   medical effects of prior events is relevant  
4                   evidence, then the evidence should not be offered  
5                   for that purpose.

6                   I talked about conditional admission  
7                   under Rule 104, specifically 104(b). But the risk  
8                   there would be that a lot of this evidence would  
9                   come in and it would never be tied to causation.  
10                  The old cart-before-the-horse analogy.

11                  So that's what I've -- that's my  
12                  determination, and that's what people need to know  
13                  for today.

14                  Another -- I want to talk about the  
15                  testimony of Jennifer Haley, just as an example.  
16                  She testified about a prior sweat lodge event that  
17                  she participated in, and that could have  
18                  independent basis for admissibility. Not just the  
19                  causation question. But it does raise the issue of  
20                  what can happen with imprecise testimony about the  
21                  effects of a prior sweat lodge.

22                  She testified, in her opinion, needed to  
23                  go to the hospital. Just potentially very  
24                  prejudicial testimony.

25                  However, the testimony regarding the

1 prior sweat lodge had other relevance besides the  
2 effect on the one participant she talked about.

3 There was a bench conference regarding  
4 Ms. Haley, and there was an indication that the  
5 state wanted to question about the knowledge of  
6 Mr. Ray concerning that effect on that participant.

7 There was actually testimony to that  
8 effect anyway, and it was not objected to. And I  
9 think it had a basis for admissibility. It came up  
10 in another context in Miss Haley's testimony.

11 However, at bench it was indicated that  
12 the relevance of knowledge of Mr. Ray would be that  
13 he would know that it was heat. And that's not  
14 pertinent to the issue of causation.

15 So right now I've acknowledged that there  
16 are some non-404(b) grounds for admissibility, and  
17 these, essentially, have been urged by the state.  
18 One I discussed at the pretrial conference on  
19 March 1 at the start. And that is as rebuttal if  
20 there is an inaccurate portrayal of state of  
21 knowledge by Mr. Ray. That was one.

22 The other that has come up is causation.  
23 But I've determined that it's not going to be  
24 appropriate to admit evidence conditionally under  
25 104(b). That there would have to be expert

1 testimony that would indicate that evidence of  
2 effects of prior sweat lodge events is relevant to  
3 the issue of causation.

4 And then there has just been a discussion  
5 throughout about what is relevant to the state of  
6 mind of a participant and what was done by a  
7 participant or by one of the alleged victims.

8 I also wanted to mention with regard to  
9 questioning witnesses -- and I'm noting the length  
10 of the testimony of witnesses. And the Court will  
11 certainly assist, if requested, by either counsel  
12 if questions are not being answered.

13 I don't like to interject myself into a  
14 proceeding. I prefer not to do that. But I'm  
15 going to just to fulfill my responsibility to make  
16 sure the trial proceeds in a reasonable manner.

17 So the parties can ask me to assist if a  
18 witness is not answering a question.

19 With regard to the disclosure question  
20 that came up yesterday, which I think is a serious  
21 matter, do you have additional authority on that,  
22 Ms. Do?

23 MS. DO: I do, Your Honor. Thank you very  
24 much.

25 I would like to cite the Court to

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, )  
 )  
Plaintiff, )  
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vs. ) Case No. V1300CR201080049  
 )  
JAMES ARTHUR RAY, )  
 )  
Defendant. )  
\_\_\_\_\_ )

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY TWENTY-TWO

MARCH 25, 2011

Camp Verde, Arizona

(Partial transcript.)

REPORTED BY  
MINA G. HUNT  
AZ CR NO. 50619  
CA CSR NO. 8335

1 said, which no one was really sure.

2 So that is a very different situation, at  
3 the same time a difficult question, because there  
4 was an element of opening the door. But it was a  
5 403 determination ultimately.

6 With regard to this situation, my  
7 question to you is all of these things that were  
8 observed by this witness, Mr. Barratt, he's  
9 apparently saying that he was warned what it would  
10 be like. Why would it take reference to prior  
11 events to do that? Redirect is appropriate on that  
12 alone.

13 So that was my question to you, Ms. Polk.  
14 If you could address that. Why would you have to  
15 go back -- when there are a number of things that  
16 he saw or he's testified to that happened, why  
17 would you have to go back and pull from prior  
18 events when, as you know from the 404(b), over six,  
19 seven events, or whatever, there was one person who  
20 went to a doctor.

21 And then it's back to the whole situation  
22 of somehow portraying through your questions that  
23 there were similar situations when, in fact, there  
24 was no similar situation to what happened in  
25 October of 2009. At least that was the

1 determination at the 404(b).

2           There was -- and no one has ever  
3 challenged -- apparently one person in 2005 went to  
4 the hospital with a nonlife-threatening condition.  
5 And then to open up a bunch of questions implying  
6 now that there were similar situations in the past  
7 would not seem to properly characterize this. So  
8 those are my initial concerns before I hear from  
9 Mr. Kelly.

10           MS. POLK: And, Your Honor, because it goes to  
11 the defendant's level of knowledge, with this  
12 witness I can ask him, were you warned that you  
13 might suffer convulsions? Were you warned that you  
14 might go into shock? Were you warned that  
15 participants might become combative?

16           THE COURT: And I -- well, okay. Go ahead.

17           MS. POLK: And his answers, I believe, are  
18 going to be no. But the problem is what is left  
19 unanswered is that Mr. Ray knows that these events  
20 have occurred in the past. So it still doesn't  
21 answer for the jury Mr. Ray's level of knowledge.

22           All it suggests, then, is that Mr. Ray  
23 didn't know that that could happen either. And  
24 what we know, the truth is that Mr. Ray knew all  
25 those things could happen. They had happened in

1 find anything improper about that question.

2 The other issue is much more difficult.

3 And, Ms. Polk, here's the problem: The  
4 asking questions suggest -- are going to suggest  
5 that there was anything like what happened in 2009,  
6 from the evidence I've seen, would be very, very  
7 misleading. One person went to the hospital over a  
8 period of a number of years with a  
9 nonlife-threatening condition.

10 The other problem is the 404(b) testimony  
11 was on a whole different standard of proof. I  
12 found clear and convincing that certain instances  
13 happened. They were relatively isolated. There  
14 wasn't a lot of specificity. Any incidents that  
15 become the subject of testimony would have to also  
16 include knowledge by Mr. Ray.

17 So to go into that with this witness and  
18 suggest there might be just multiple people out  
19 there that Mr. Ray knew about everybody, that would  
20 be -- I don't see the basis for that. T.

21 Here might be a way -- well, I don't  
22 wanted to go further. I told you the concern.

23 And I'm back to my initial question is,  
24 you can ask on redirect why he thinks it was proper  
25 warning when he's taking people out and doing these

1 (Sidebar conference.)

2 MS. DO: Your Honor, I have no objections with  
3 counsel going into the PowerPoint. But the  
4 PowerPoint contained summaries of statements from  
5 the priors. And so I hope he's not opening that  
6 door.

7 MR. HUGHES: Your Honor, I believe Ms. Do went  
8 in to great detail about what the doctor was told  
9 and what he relied upon making his decision. And  
10 in that PowerPoint there is discussion about prior  
11 incidents in '05 and '08 and, I believe, statement  
12 by Mr. Ray, that he needed the sweat lodges to be  
13 even hotter than before.

14 That is information that was provided to  
15 the doctor. And the doctor indicated in his  
16 interview, the defense interview, that he did  
17 review the PowerPoint. I think it would be very --  
18 quite honestly, it would be dishonest to leave the  
19 jury with the opinion of only some of the things  
20 that the doctor was given to rely upon and not the  
21 other things.

22 THE COURT: Ms. Do, anything else?

23 MS. DO: Not unless the Court needs to hear  
24 from me.

25 THE COURT: There can't be any leading. If

1 But the defense has created a situation  
2 where they have asked this doctor about what he was  
3 told, what he wasn't told, and left an impression  
4 in the jurors' mind that he wasn't told quite a few  
5 things about the incident.

6 And it's appropriate for the state at  
7 this point to go in to what precisely the doctor  
8 was told and what was provided to him.

9 THE COURT: You talked about the incident, but  
10 then you're talking about prior incidents,  
11 Mr. Hughes. How would a prior incident from four  
12 years ago -- how would it relate to what an opinion  
13 would be as to what caused the situation here?

14 MR. HUGHES: Well, the defense has created a  
15 special situation now where they've created an  
16 issue and under their cross-examination of the  
17 thoroughness of the briefing that was provided to  
18 Dr. Lyon. This is relevant.

19 That issue they raised and went in to  
20 great depth on in their cross-examination of the  
21 thoroughness of the briefing that was provided to  
22 Dr. Lyon to the other medical examiners.

23 And then, Your Honor, with respect to the  
24 interview, they -- Mr. Li asked the doctor if in  
25 the PowerPoint it says 20 participants got sick

1 treading on dangerous grounds.

2 THE COURT: We are. There is no doubt about  
3 that. That could take us right into the 404(b)  
4 area.

5 I'm looking at the nature of the  
6 information provided here. Was it with  
7 Mr. Pfankuch -- weren't some of the descriptions --  
8 I remember reading hundreds of pages of interviews  
9 about various things, something about walking on  
10 hands and superhuman strength.

11 Was that the person.

12 MS. DO: Yes. I think the witnesses' accounts  
13 were that he had an out-of-body experience.

14 THE COURT: Actually, superhuman strength.  
15 That's one of the things that's sticking in my mind  
16 from looking at that. Was punching and that kind  
17 of thing?

18 MS. DO: I recall descriptions of him being  
19 combative and that the opinions of the observers  
20 were he was having an out-of-body experience.

21 But we know based upon the medical  
22 records he did not have heat stroke. He went in  
23 and was out the very same night.

24 MR. HUGHES: Your Honor, we have had testimony  
25 now that becoming combative is a sign of someone

<p style="text-align: right;">97</p> <p>1 Q But you could be mistaken about that?</p> <p>2 A Yes, I could</p> <p>3 Q Could it have been as early as May</p> <p>4 of 2009?</p> <p>5 A Could have, yes</p> <p>6 MR KELLY Your Honor, objection. It's a</p> <p>7 leading question. She answered she didn't know</p> <p>8 THE COURT Overruled. Ladies and gentlemen,</p> <p>9 we're going to go ahead and take the noon recess at</p> <p>10 this time. Please remember the admonition. All</p> <p>11 aspects of that. Please be reassembled. Let's say</p> <p>12 20 after one. We'll get started at one 30. Remind</p> <p>13 you of the add mop I guess and Ms. Foster you will</p> <p>14 be excused for the recess as well. Remember the</p> <p>15 rule of exclusion of witnesses and not trying to</p> <p>16 communicate in any way with any other. /REUT</p> <p>17 /WEUFPLT it's a good idea not to talk to /PHEB</p> <p>18 about the case until it's over. Again you can talk</p> <p>19 to the attorneys as long as another witness is not</p> <p>20 present. So I'm going to ask the parties to /RE</p> <p>21 /PHAUPB. The bit and the jury is excused at this</p> <p>22 time. Thank you.</p> <p>23 THE COURT Ms. Polk, we had the rather</p> <p>24 lengthy sidebar. I'll let the record show that the</p> <p>25 jury has left. Mr. Ray and the attorneys are</p>	<p style="text-align: right;">99</p> <p>1 the same. We are taking a lunch break and I can</p> <p>2 see my detective nodding his head in agreement with</p> <p>3 me. I'll take the time of the lunch hour to</p> <p>4 verify. I believe the testimony will be that it's</p> <p>5 the same.</p> <p>6 THE COURT Thank you. And Mr. Kelly. You</p> <p>7 indicated you believe there is a disclosure issue.</p> <p>8 MR KELLY I do, Judge. If I could respond</p> <p>9 previously to that. I'm concerned about the states</p> <p>10 response. I believe it's the same. I submit judge</p> <p>11 that if there is any relevance /KPWEPB I'd review</p> <p>12 all my argument at sidebar in some how that</p> <p>13 relevance overcomes any three 4 oh three concerns.</p> <p>14 THE WITNESS The same would mean identical</p> <p>15 Many only the frame structure which is left</p> <p>16 constructed over a period of time, but also the</p> <p>17 materials which are placed on top.</p> <p>18 THE COURT What I call the coverage.</p> <p>19 MR KELLY The covering has to be placed in</p> <p>20 the eye den call fashion. And when I see</p> <p>21 Detective Diskin nodding yes. Given my /RE sue of</p> <p>22 the disclosure I believe there are witnesses who</p> <p>23 will say that's our structure and these are our</p> <p>24 tarps, but I don't know that anyone can under oath</p> <p>25 say we constructed this thing identical in an</p>
<p style="text-align: right;">98</p> <p>1 present. After the lengthy sidebar. I had that</p> <p>2 concern with talking about being involved in other</p> <p>3 sweat lodges. But what I had said is that if in</p> <p>4 fact this was the same sweat lodge structure that</p> <p>5 was used in October, completely the same, then</p> <p>6 there would be relevance to this person being in</p> <p>7 that sweat lodge. I'm concerned about whether she</p> <p>8 really nose that and concern about is there really</p> <p>9 another witness who would be saying that the</p> <p>10 materials are just absolutely identical. There</p> <p>11 hadn't been any changing in the covering or</p> <p>12 anything like that. I didn't want to go any</p> <p>13 further without addressing that.</p> <p>14 MS POLK Your Honor, it's the states belief</p> <p>15 there will be two more witnesses that or perhaps</p> <p>16 three the Hamiltons will testify that it is the</p> <p>17 same skeleton and the same materials. And then I</p> <p>18 believe Mr. Mercer will as well.</p> <p>19 THE COURT For the testimony to be admissible</p> <p>20 on the basis I've indicated at sidebar, that's</p> <p>21 critical. That that's the case. So I wanted to</p> <p>22 stop and make sure that that is the case before you</p> <p>23 got into those questions about her experience in</p> <p>24 may or whenever it was. I wanted to address that.</p> <p>25 MS POLK Your Honor, I do believe that it is</p>	<p style="text-align: right;">100</p> <p>1 identical fashion on each other case and again, if</p> <p>2 the only purpose of this is causation judge, I see</p> <p>3 it having limited limited probative value and a</p> <p>4 great deal of /PREPL advertise as we've submitted</p> <p>5 throughout the course of this. There seems to be</p> <p>6 this idea kind of a negligence theory that my</p> <p>7 client doesn't know how to conduct a sweat lodge</p> <p>8 like Native Americans do and people get sick. And</p> <p>9 that ^ Miss ^ miss leads the jury away from this</p> <p>10 manslaughter charge. Finally judge, in regards to</p> <p>11 the disclosure iron issue. This witness testified</p> <p>12 that on October 8, I believe she said bat 1130 p.m.</p> <p>13 she spoke with detectives and. We don't have any</p> <p>14 information in that regard. We've just ^ do</p> <p>15 not ^ done a search of all the police report. It's</p> <p>16 not in there. We do have a copy of the October 26</p> <p>17 in /T-R view with Yavapai County Sheriff's Office.</p> <p>18 THE COURT Ms. Polk what is the interview you</p> <p>19 have.</p> <p>20 MS POLK Your Honor, I only have the</p> <p>21 information per /TAEPBG to the October 26 interview</p> <p>22 as well. I don't know. The state has no</p> <p>23 information in the form of audio recording nor a</p> <p>24 police report pertaining to not guilty 11 o'clock</p> <p>25 that night. It not clear to me who that witness</p>

<p>13</p> <p>1 is heat that killed the three victims They are  2 suggesting that it's something other than heat such  3 as chemicals on the property in the form of  4 insecticides, something sprayed here or there or  5 perhaps in the tarps themselves So the defendant  6 is charging causation relevant to causation then  7 Is this information that relates to sweat lodges  8 run at Angel Valley in the preceding years and  9 there is actually three patterns that are relevant  10 The first is that if it's the defendant running the  11 sweat lodge, then people get sick It doesn't  12 matter what the kiva is made of It doesn't matter  13 what the covering is made of What matters if it's  14 the defendant running the sweat lodge then people  15 get sick During that time frame from 2005  16 through 2009, there are many other sweat lodges  17 that are conducted on the property of Angel Valley  18 and testimony will be that people don't get sick  19 So the first pattern is regardless of the kiva,  20 regardless of the bps and the coverings and the  21 wood and the water, and the rocks if the defendant  22 runs it then people get sick That's what's  23 identical /-FPT the second pattern from May of 2008  24 forward, actually I think it's August of 2008  25 forward, when the kiva was built that was used</p>	<p>15</p> <p>1 that 9-1-1 it was called the ambulance came she  2 confronted Mr Ray she told them this will /TPHER  3 happen again on my property he apologized in oh 4  4 he /RAFP et cetera down the heat in oh six And  5 then ^ bio ^ bio&lt;Delete Space&gt; seven, the testimony  6 at the 404(b) hearing is he wanted it hotter again  7 In oh seven people get sick In 2008 that's when  8 the new kiva was built and the same coverings are  9 put on the structure oh seven people get sick Oh  10 eight people get even sicker and in 2009 three  11 people die There is three different patterns that  12 are relevant to this issue of causation The  13 common did he no, ma'am nay tore through all those  14 patterns, the things that's identical is the  15 defendant It's not relevant to two of these three  16 patterns what the kiva was made of or what the  17 structure was The information is relevant because  18 it goes to this issue of causation It's through  19 the three patterns that there is information that  20 leads the jury to conclude that it's the heat that  21 kills and not some other substance on the property  22 Some of the pesticide Your Honor, the I just  23 want to discuss the interview with Ted Mercer  24 yesterday The state was given a transcript this  25 morning I was there for the interview with</p>
<p>14</p> <p>1 in 2008, the latter part of 2008 and 2009, that the  2 ceremonies conducted in that kiva and coverings  3 which are essentially the same the pattern again is  4 that if it's the defendant running the sweat lodge  5 people get sick and if it's somebody else running  6 it, people don't get sick So the first pattern is  7 it doesn't matter what the can I /RA is made of  8 what the covering is made of the common did he  9 nominate tore /T-T defendant The second /PA  10 interpret when it's he ^ accept ^ except /SHAL Li  11 the same covering it is the same kiva the common  12 did he mom nay tore is the defendant If he's  13 running it people get sick If other people are  14 facilitating the sweat lodge people don't get sick  15 The third pattern is this pattern of the defendant  16 and heat And what the testimony will be through  17 various witnesses is that in oh three and oh 4, the  18 sweat lodge was not hot enough for the defendant  19 and he asked for more and more heat in oh five, the  20 Hamiltons created this large rubber membrane that  21 goes over the sweat lodge They added that and  22 that's the year that people got sick including  23 Daniel Pfankuch and I'll talk about his records in  24 a moment After the oh five incident the testimony  25 at the 404(b) hearing through Amayra Hamilton was</p>	<p>16</p> <p>1 Mr Mercer, and on page 8 lines 13 through 28  2 Mr Li says to Mr Mercer, okay, and you have no  3 idea whether these coverings other than the big  4 sort of round one are exactly the same as all the  5 other sweat lodges /SAQERZ  6 THE WITNESS Mr Mercer says oh sure they're  7 the same Mr Li says you don't know that because  8 they're not numbered they Mr Mercer says I know  9 that because I'm the one that put them away and I'm  10 the one that went and got them So I in between  11 the time no one else would go in there Every once  12 in a while there might be new ^ ones ^ once that  13 would show up in the package and then on page 11,  14 when Mr Li is then doing what he can rightly do in  15 front of the jury which is /A to attempts to /EFP  16 /PAE pick away at the weight of the evidence  17 Mr Li says the only person who would know is  18 Michael Hamilton Mr Mercer agrees with that And  19 then if I can direct the courts attention to  20 Exhibit 661, which is the transcript of the  21 interview of Michael and Amayra Hamilton on October  22 /TWEPT six of 2009 by the detective, on /PAEPBLG  23 five lines 23 through 28 detective polling says so  24 the 2009 lodge is different than the 2008 and  25 Mr Hamilton says 2008 and 2009 were exactly the</p>